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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 509

UNITED STATES OF AMERICA, *Petitioner,*

v.

HARRY N. BAETJER, *et al.*, Trustees,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR RESPONDENTS IN OPPOSITION

EARLE T. FIDDLER,
Attorney for Respondents.

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Opinion Below

The opinion of the Circuit Court of Appeals (R. 559-567) is correctly cited in the Petition.

Statement of the Case

No questions of fact are raised in the Petition. No questions of fact were passed upon or decided by the Circuit Court. The District Court in reality made no findings

of fact (R. 23, 24). The statement of facts in the Petition is the Petitioner's own interpretation of the facts which the Record shows were the subject of much conflicting testimony. How much of the testimony and what testimony the District Court believed is a matter of pure conjecture. If issues of fact were involved in these proceedings we would necessarily be forced to take issue with many of the statements and conclusions of fact as represented by the Petitioner.

The only fact of importance is the fact that the lands condemned were physically separated from the balance of what Respondents claim is an entire integrated property, of which Respondents have consistently maintained that the part condemned formed an integral part. The only point decided was that the District Court erred in refusing as a matter of law (R. 242) to permit Respondents to prove that the property was an integrated whole, and the damage, if any, resulting from the severance.

We assume that this Court will not study the record to determine whether or not the Petitioner has correctly stated facts which are not in issue in this proceeding, and, therefore, refrained from pointing out errors in the statement of facts.

Summary of Argument

I. The "Question Presented" was not in issue in the Circuit Court and was not decided by the Circuit Court.

II. The petition does not state any reasons sufficient to justify granting the writ.

a. Petitioner has not correctly interpreted the opinion of the Circuit Court.

b. The rule announced by the Circuit Court is in conformity with the rule in the State and Federal Courts.

c. The Circuit Court correctly remanded the case.

d. Petitioner incorrectly charges that there was no unity of title.

e. The question of law involved requires no clarification by this Court.

f. The decision of the Circuit Court presents no difficult appraisal problems.

g. The Petition presents no question which involves a conflict of authority in the various Circuit Courts.

FIRST

The "Question Presented" was not in issue in the Circuit Court and was not decided by the Circuit Court.

The question which the Circuit Court decided was that if part of a unified, integrated property is taken by condemnation, damages for severance, if proven, should be allowed regardless of whether or not the part condemned was contiguous to the balance of the unified property, and that "evidence should have been considered in order to determine as a matter of fact whether, in spite of lack of physical contiguity, their holdings by reason of the uses to which they were being put, or would probably be put in the reasonably near future, constituted "a single integrated, unitary tract." (143 F. [2d] 391.)

The "Question Presented" cannot be adduced from the decision or the opinion of the Circuit Court.

The statement of the "Question Presented" is so confused that it is difficult to determine just what point the Petitioner wishes this Court to consider. Let us analyze the statement of the "Question Presented":

(a) "Damages to sugar mill properties."

The property which Respondents contend is a single unified whole, is one single rural property all but one piece of which was acquired at one time, by one deed, and recorded as one farm (*Baetjer* v. *Registrar*, 48 P.R.R. 647; also R. 43-46). A contiguous piece of 2,000 acres was acquired later and formed part of the single unit. The property remaining after the severance consists of several thousands of acres of land on which are located sugar mills devoted to processing sugar cane grown on the estate lands into a marketable agricultural product. The property is not "sugar mill properties", but a large unified agricultural estate consisting of cane land, necessary pastures and containing sugar mills as part of the essential farm improvements. The Circuit Court correctly held that this was a fact which we should have been permitted to prove.

(b) "Because of resulting economic capacity."

This is in reality the only question stated in the Petition,—namely, *whether economic over-capacity of sugar mills* resulting from the taking of non-contiguous lands must be compensated for in condemnation proceedings. The Circuit Court did not so hold. On the contrary, the Circuit Court carefully pointed out (142 F. [2d] 395, 396) that the only compensation which may be allowed "is the difference between the fair market value of the entire unitary tract before the taking and the fair market value of the part of the tract remaining thereafter". That this is a correct statement of the law is axiomatic.

(c) "Not physically contiguous to the mill properties."

The emphasis on mill properties is not warranted by the opinion of the Circuit Court or by any facts appearing in the record. The part remaining from which the property

condemned was severed as we have said above, consists of an estate of several thousand acres of agricultural land on which sugar mills are located as part of the farm improvements.

(d) "Not presently devoted to the same use."

This is a statement of fact which cannot possibly be derived from the record, and the Court did not so find. The record clearly shows that the land condemned was presently used as essential pasture of the entire unified estate, and that its use in part for cane production had been only temporarily suspended because of quota restrictions, which in fact had been lifted shortly before the condemnation proceedings were brought (R. 179, 180).

The Petitioner apparently is asking this Court to examine the record and determine the facts.

(e) "And the properties are not held entirely in a unified fee ownership."

This is a misstatement of undisputed facts. The entire single, unified property is owned in fee. Respondents have at no time claimed damages for severance from leased lands, which appears to be the basis of Petitioner's contention that "the properties are not held entirely in a unified fee ownership" (P. 2). That the Respondents in addition to the unified estate, also leased additional lands is immaterial.

In order to state a "Question", Petitioner has read into the opinion of the Circuit Court conditions which do not exist, and assumptions of fact which are not supported by the record, and which were in no way essential or relevant to the problem under consideration by the Circuit Court.

In order to consider the "Question Presented" this Court would first have to examine the entire record and in effect formulate findings of fact.

SECOND

The petition does not state any reasons sufficient to justify granting the writ.

(a) Petitioner has not correctly interpreted the opinion of the Circuit Court.

Petitioner (P. 8) represents the Circuit Court as holding that "there would be a compensable loss if after the taking the appellants' mills had an uneconomic over capacity so that they could not be operated by anyone as efficiently and therefore as profitably as before the taking." By failing to complete the sentence, the Petitioner creates a false impression of the Court's decision. The opinion continues after a comma, "this being a matter which a hypothetical buyer would consider in determining what he would pay for the property". When the whole sentence is read the meaning of the Court is a clear and precise statement of the principle which has been firmly established by this Court. The Court had already said that "the landowner's compensation is the difference between the fair market value of the entire unitary tract before the taking and the fair market value of the part of the tract remaining thereafter."

Having misinterpreted the opinion of the Court, Petitioner then proceeds in paragraph numbered 1 (P. 8) to attack a principle which the Circuit Court did not announce. Neither *United States* v. *Miller,* 317 U. S. 369, nor *Mitchell* v. *United States,* 267 U. S. 341 (P. 9), have any bearing on the point decided by the Circuit Court. This Court, in the quotation from the opinion in the former case, was referring to separate properties not forming part of a unified whole. The quotation in fact follows the statement by this Court that "a parcel of land which has been used and treated as an entity shall be so considered in assessing compensation for the taking of part or all of it." In the latter case, the claimant had accepted an award for his property without protest (343) and then proceeded in the Court of Claims

to demand indemnity for the loss of a business which had been conducted on the land. The claim was not for value of property at all.

The difference between the present case and the *Powelson* case (319 U. S. 266, reversing *United States* v. *Powelson,* 118 F. [2d] 79), (P. 10), is that in the *Powelson* case the unity was prospective and impossible of realization, whereas in the present case it is an actual present fact. This Court reversed the Circuit Court in the *Powelson* case, not because the Circuit Court (118 F. [2d] 79, 86) had allowed severance damages for non-contiguous tracts, but because there were impediments to the ultimate realization of the integration. If this Court had deemed contiguity to be a *sine qua non* of severance damages, it could have reversed the Circuit Court quite simply on that ground.

In *McCandless* v. *United States,* 298 U. S. 342 (P. 10), this Court held that the prospect of future irrigation from sources many miles distant owned by other parties, with intervening properties also owned by others, was a proper element in determining value.

(b) The rule announced by the Circuit Court is in conformity with the rule in the State and Federal Courts.

Petitioner states that "similar claims have been made and rejected in numerous State cases". The cases cited do not warrant that conclusion.

City of Oakland v. *Pacific Coast Lumber Company,* 171 Cal. 392 (P. 10), rested solely on a construction of the California statute which expressly requires contiguity as a matter of law as a prerequisite to severance damages. The other State cases cited by Petitioner rest squarely on the proposition that as a matter of fact the parcels in question were not so related to each other in use as to make them a single unitary property. In fact in several of these cases the principle is recognized that if properties are a single unit, even though not contiguous, severance damages are properly allowable, notably, *Kansas City M. & O. Ry. Co.*

v. *Littler*, 70 Kan. 556 (P. 11), *Potts* v. *Railroad Co.*, 119 Pa. 278 (P. 10), *Railroad* v. *Aubuchon*, 199 Mo. 352 (P. 11). *State* v. *Bradshaw Land and Livestock Co.*, 199 Mont. 95 (P. 11), rested squarely on the state statute defining severance damages and expressly held that there was no showing that separated lands were permanently injured or destroyed. The doctrine stated in *Fleming* v. *Chicago, D. & M. Railroad Co.*, 34 Iowa 353 (P. 11), was expressly repudiated in the subsequent case of *Paulson* v. *State Highway Commission*, 210 Iowa 651, which held that where two parcels were a mile apart "it was for the jury to determine whether or not the farm was a single and entire farm for the purpose of estimating the damages."

The rule of unity regardless of contiguity is the logical, sensible rule and is the rule of the Federal Courts and most State Courts. *Sharp* v. *United States*, 112 F. 893, 896, approved in *Sharp* v. *United States*, 191 U. S. 341; *United States* v. *Grizzard*, 219 U. S. 180; *Grand River Dam Authority* v. *Thompson*, 118 F. (2d) 242, 245. No decision of this Court or of any Federal Court is referred to in the Petition, which holds differently. For a review of State cases and a discussion of the principle, see *Essex Storage Electric Co.* v. *Victoria Lumber Co.*, 93 Vt. 437, 108 A. 426.

Early cases to the contrary have been repudiated. *United States* v. *Chicago, B. & Q. R. Co.*, 82 Fed. (2d) 131 (cert. den. 298 U. S. 689).

Petitioner cites 2 Nichols, Eminent Domain (2nd Ed.) 740 (P. 9). This is what Mr. Nichols says:

> "If the land is actually occupied or in use the unity of the use is the chief criterion. When two parcels are physically distinct there must be such a connection or relation of adaptation, convenience and actual and permanent use as to make the enjoyment of one reasonably necessary to the enjoyment of the other in the most advantageous manner in the business for which it issued, to constitute a single parcel within the meaning of the rule."

What we objected to in the Circuit Court was the refusal of the District Court as a matter of law to permit us to prove unity,—a unity which had been actually found to exist by the Supreme Court of Puerto Rico in an appeal raising the very same issue with respect to the very same lands. *Baetjer* v. *Registrar*, 48 P. R. R. 647, 648, 649.

The District Court struck out all evidence as to severance on the ground that there was no severance "in the legal sense". Obviously the Court failed to consider the evidence it had stricken. The District Court made no findings of fact.

The Circuit Court correctly held that "evidence should have been considered in order to determine as a matter of fact whether, in spite of lack of physical contiguity, their holdings by reason of the uses to which they were being put, or would probably be put in the reasonably near future, constituted a single integrated, unitary tract" (143 F. [2d] 391).

(c) The Circuit Court correctly remanded the case.

Petitioner contends (P. 12) that if the District Court had considered the evidence of integration and unity it would have held that unity and integration did not exist. We assume that this Court will not perform the function of deciding what the District Court would have found if it had considered the evidence. That is the function of the trial court.

(d) Petitioner incorrectly charges that there was no unity of title.

The Petitioner contends (P. 13, 14) that there is no unity of title because defendants also held land under lease in addition to the estate of which Respondents claim that the land condemned formed an integral part. Severance damage was not claimed on account of damages to a property part of which is leased. The compensation asked is for damages to the balance of the integrated estate owned in fee.

(e) The question of law involved requires no clarification by this Court.

The result of the decision of the Circuit Court does not extend the Federal Government's liability in cases where severance damage is claimed (P. 15). The Petitioner seeks to have this Court repudiate a rule long established in the Federal Courts and in most State Courts, that damages for severance depend on whether the value of a unified property has been affected by the condemnation of a part regardless of whether or not the part taken is contiguous to the balance of the unit.

(f) The decision of the Circuit Court presents no difficult appraisal problems.

Finally the petition states as a reason for granting the writ that "if the ruling below is sound, large integrated companies with disconnected holdings will in fact be obtaining, under the guise of severance damages, compensation for business losses which were denied by this Court in the *Mitchell* case". The opinion of the Circuit Court warrants no such conclusion. So long as the courts, as the Circuit Court did in this case, limit compensation to the value of real property taken, severance damages to cases where the property condemned forms part of a unified, integrated property, and follow the rule of the willing buyer and the willing seller as announced by the Circuit Court, there would seem to be little danger that the United States will be imposed upon by the Courts.

(g) The Petition presents no question which involves a conflict of authority in the various Circuit Courts.

The decision of the Circuit Court is logical, reasonable and follows the principles long established in the Federal Courts. No convincing reason is given for asking this Court to change the rule of severance damages.

CONCLUSION

The decision of the Circuit Court of Appeals was in all respects correct and the Petition should be denied.

Respectfully submitted,

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San Juan, Puerto Rico,
November 1, 1944.